Supreme Court, U.S.
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No. 00-829

IN THE
Supreme Court of the United States

KELLY JEAN CHRIS,

Petitioner,

v.

GEORGE J. TENET, DIRECTOR,
CENTRAL INTELLIGENCE AGENCY,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

DAVID C. VLADECK
Counsel of Record
ALAN B. MORRISON
TANYA Y. BARTUCZ
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioners

PAMELA BRUCE STUART
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-2200
Of Counsel

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13 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

INTRODUCTION AND SUMMARY OF ARGUMENT . 1

I. THE FOURTH CIRCUIT'S RULING IS AT ODDS WITH PREVAILING LAW 2

A. The Conflict With *Carey* 2
B. The Fourth Circuit's Ruling Conflicts With Eighth And Tenth Circuit Rulings 5
C. The Decision Below Threatens Enforcement Of IDEA 6
D. The Continuing Confusion Over *Carey* And *Crest Street* 7

II. THE DECISION BELOW WILL FRUSTRATE TITLE VII'S DEFERRAL SCHEME 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page**

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 9
Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 9
Jones v. American State Bank,
857 F.2d 494 (8th Cir. 1988) 5, 6
New York Gaslight Club v. Carey,
447 U.S. 54 (1980) ..... *passim*
North Carolina Department of Transportation v. Crest St. Community Council, Inc.,
479 U.S. 6 (1986) 7
Slade for Estate of Slade v. Postal Service,
952 F.2d 357 (10th Cir. 1991) 5, 6
West v. Gibson, 527 U.S. 212 (1999) 4, 9

Statutes:

20 U.S.C. § 1415(e)(4)(B) 7

42 U.S.C. § 1988 7

42 U.S.C. § 2000e-5(f)(3) ..... *passim*

42 U.S.C. § 2000e-16(c) ..... *passim*

42 U.S.C. § 2000e-16(d) 4, 5

REPLY TO BRIEF IN OPPOSITION

Introduction and Summary of Argument

Respondent George J. Tenet, Director, Central Intelligence Agency ("respondent"), devotes virtually his entire opposition brief to defending the merits of the Fourth Circuit's ruling that district courts lack jurisdiction under Title VII in fee-only cases. But nowhere does respondent deny the importance of this case to the tens of thousands of federal employees who bring discrimination charges each year, or to the thousands more who bring discrimination claims before state and local agencies. Nor does respondent effectively address petitioner's showing that the ruling below creates serious disarray in the lower courts on the jurisdictional reach of Title VII and statutes modeled on it. As the Petition demonstrates, the Fourth Circuit's ruling is at odds with this Court's holding in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980), with the holdings of the Eighth and Tenth Circuits in similar Title VII cases, and with the uniform case law construing the jurisdictional provision of the Individuals with Disabilities Education Act ("IDEA"), which in all relevant respects is identical to that in Title VII.

The Petition anticipated and addressed most of the respondent's arguments, and hence this reply does not answer them one-by-one. Rather, we make two points. First, there is, in fact, a serious conflict in the law in this area which calls out for this Court's review. Until the ruling below, every court to address whether Title VII authorizes fee-only litigation concluded that it does; the Fourth Circuit, at the government's urging, has now broken ranks and its ruling unsettles what had long been stable, uniform law. Review is warranted to resolve the conflict in this important area of the law.

Second, the ruling below, if allowed to stand, creates substantial incentives for Title VII plaintiffs to abandon state and federal administrative dispute resolution proceedings as

soon as they are able to, and to head to federal court, thereby avoiding the risk of under-compensation that is inevitable under the Fourth Circuit's ruling. The ruling therefore jeopardizes Congress' effort to encourage the administrative resolution of Title VII disputes.

I. THE FOURTH CIRCUIT'S RULING IS AT ODDS WITH PREVAILING LAW.

A. The Conflict With *Carey*. Respondent's effort to minimize the confusion created by the Fourth Circuit's ruling is off target. Respondent begins, not by addressing *Carey*, but by accusing petitioner of offering "no textual analysis of the pertinent provisions of Title VII," suggesting that the question presented in this case comes before the Court on a blank slate. Respondent's Brief in Opposition ("Opp. Br.") at 7. It is respondent who fails to address the plain and unambiguous language of Title VII's jurisdictional provision, which was authoritatively construed in *Carey*, and discussed in the Petition at 11-12.

Title VII's jurisdictional provision, section 2000e-5(f)(3), provides that "[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter." 42 U.S.C. § 2000e-5(f)(3). Federal employees like petitioner are required to exhaust their administrative remedies prior to filing suit. The provision authorizing suits by government employees provides that if "an employee" is "aggrieved by the final disposition of his complaint . . . [he] may file a civil action as provided in section 2000e-5 of this title . . .." *Id.* § 2000e-16(c). Thus, the jurisdictional language of section 2000e-5(f)(3) governs here, and the question is whether an action to enforce Title VII's attorney's fee provision is one "brought under this subchapter." As this Court explicitly held in *Carey*, the answer to that question is yes. *Carey*, 447

U.S. at 66 (Title VII's "authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state or local proceedings").

Respondent contends otherwise. *Carey* did not resolve this question, argues respondent, because in *Carey* the plaintiff joined a soon-to-be-mooted merits claim with her claim for attorney's fees. Therefore, respondent maintains, *Carey* does "*not* address the question whether a plaintiff who has participated in state administrative proceedings can maintain an independent suit *solely* for fees." Opp. Br. at 11-12 (citation omitted) (emphasis in original). But respondent also acknowledges (*id.* at 12) that in cases where

> fees are *not* available in the administrative proceedings—as in *Carey,* 447 U.S. at 67 n.7—then an independent action to recover fees should be permitted because such an action provides the sole opportunity for recovery. *Id.* at 65-66 (noting that "availability of fees should not depend upon the "fortuity" that a plaintiff "ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees").

Respondent thus makes the remarkable claim that different jurisdictional rules apply to different plaintiffs based, not on any variation in the language of section 2000e-5(f)(3), but exclusively on whether attorney's fees were available in the underlying administrative proceeding. If fees were available, there is no jurisdiction; if fees were unavailable, district court jurisdiction lies. Based on this interpretation of the Act — accepted by no court outside the Fourth Circuit — respondent contends that, because attorney's fees may be awarded by the Equal Employment Opportunity Commission, petitioner's claim here is foreclosed. The same rule would also apply to claimants

who prevailed on the merits in state and local administrative proceedings, but were disappointed by an inadequate fee. Under respondent's theory, they too would be precluded from challenging the inadequate fee in federal court.

The signal defect in respondent's approach is that nothing in the jurisdictional provision of Title VII draws the line respondent and the Fourth Circuit invented. Section 2000e-5(f)(3) does not say, as the respondent appears to suggest, that fee-only cases may be brought where fees are unavailable administratively but may not be brought where they are. And certainly nothing in this Court's opinion in *Carey* supports this theory; indeed, this Court's holding in *Carey* contradicts it. The decision below cannot be reconciled with *Carey*, which underscores the need for review.[1]

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[1]In a fall-back argument that applies only to federal employees, respondent contends that the right to bring a fee-only case against the government is foreclosed by section 2000e-16(d), which says: "The provisions of section 2000e-5(f) through (k) of this title [the jurisdictional and remedial provisions], as applicable, shall govern civil actions brought hereunder . . .." A suit for fees only is barred by section 16(d)'s "brought hereunder" language, according to respondent, because that language assumes the pendency of a preexisting suit. Opp. Br. at 8-10. That reading of section 16(d) stretches the meaning of the "brought hereunder" language past the breaking point, and has been accepted only by the Fourth Circuit. Section 16(d)'s purpose is to ensure that in Title VII cases the government is treated no better and no worse than private litigants. *See West v. Gibson,* 527 U.S. 212, 222-23 (1999); *see also id.* at 225-26 (Kennedy, J., dissenting). To argue that section 16(d) *limits* the right of a Title VII plaintiff

(continued...)

B. The Fourth Circuit's Ruling Conflicts With Eighth And Tenth Circuit Rulings. The Petition demonstrates that the ruling below conflicts with decisions of both the Eighth and Tenth Circuits. *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988); *Slade for Estate of Slade v. Postal Service*, 952 F.2d 357 (10th Cir. 1991). Respondent attempts in vain to distinguish these cases, but relies on reasons that have nothing to do with the scope of Title VII's jurisdictional provision. *Jones*, respondent claims, is distinguishable on the same ground as *Carey;* that is, attorney's fees were unavailable in the state administrative proceeding in which the plaintiff had obtained merits relief. But as Judge Heaney so aptly put it, that is "a distinction without a difference" in determining whether the district court had jurisdiction to entertain a fee-only case. 857 F.2d at 497. Respondent argues that *Slade* is distinguishable as well because, like the plaintiff in *Carey*, the *Slade* plaintiff initially sought merits relief in court and hence the Tenth Circuit was not presented with the question of whether a fee-only case is authorized under Title VII. That is not, however, how the Tenth Circuit saw the case. Rather, its ruling is explicitly premised on *Carey*'s holding that Title VII's "'authorization of a civil suit in

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[1](...continued)
who has been denied an adequate fee at the EEOC to bring suit, notwithstanding the direct authorization of such litigation in sections 5(f)(3) and 16(c), stands the purpose of section 16(c) on its head. Even worse, the argument draws too much from too little. If respondent were correct about the meaning of the "brought hereunder" language, then courts would be forbidden from entertaining suits for back pay, injunctions, or other relief authorized by section 5(g), where the parties have agreed that there was a violation of law, but still dispute the remedy.

federal court encompasses a suit *solely* to obtain an award of attorney's fees for legal work done in state and local proceedings.'" 952 F.2d at 361 (quoting *Carey*, 447 U.S. at 66) (emphasis added).

By splitting hairs over whether *Jones* and *Slade* are distinguishable from this case, respondent is trying to obscure the forest with the trees. The forest here — wholly unaddressed by respondent — is that the decision below breaks ranks with every prior decision interpreting the jurisdictional reach of Title VII, and therefore, this case merits review.

C. The Decision Below Threatens Enforcement Of IDEA. The Petition demonstrates (at pp. 16-17) that the decision below conflicts with a substantial body of case law interpreting the jurisdictional provision of the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(e)(4)(B), which has been consistently construed to authorize fee-only cases. The Petition explains that when Congress added a fee provision to IDEA in 1986 Congress used Title VII's jurisdictional provision as its model because it wanted to ensure that parents who prevailed in administrative proceedings under IDEA could seek fees in court.

Respondent nowhere takes issue with our analysis of IDEA. Nor does respondent dispute that the Fourth Circuit's decision threatens to destabilize the law under IDEA, which has been uniform for more than a decade. Instead, respondent tries to explain away the interpretative approach of the IDEA courts by arguing that they "have undoubtedly been influenced by a similar difficult choice between allowing independent actions solely to recover attorney's fees for work performed in mandatory administrative proceedings or allowing no recovery of fees whatsoever to the most successful plaintiffs (who have no need to file suit on the merits in court)." Opp. Br. at 17-18.

That observation may be correct, but it is wholly irrelevant here. Respondent does not explain why that "difficult choice" is in any way affected by the language of IDEA's jurisdictional provision, which is identical in all pertinent respects to Title VII's, or how the manner in which IDEA courts have resolved that choice can be reconciled with the decision below. Because the Fourth Circuit's ruling threatens the uniform enforcement of not just Title VII, but IDEA as well, review by this Court is warranted.

D. The Continuing Confusion Over *Carey* And *Crest Street*. Perhaps the most glaring defect in respondent's position is its refusal to confront the obvious fact that lower courts are having difficulty navigating between the *Carey* rule — that district courts have jurisdiction in Title VII fee-only cases — and the rule announced in *North Carolina Department of Transportation v. Crest St. Community Council, Inc.*, 479 U.S. 6 (1986) — that district courts do not have jurisdiction over independent suits under 42 U.S.C. § 1988 to recover attorney's fees under Title VI of the Civil Rights Act of 1964. The tension between the two decisions is palpable and undeniable. Almost every court to address jurisdiction in a fees-only case brought under Title VII, IDEA, or section 1988 has had to wrestle with whether *Carey* or *Crest Street* governs. To be sure, until the ruling below, the courts in Title VII and IDEA cases have all held that *Carey*, not *Crest Street*, governs. But now that the Fourth Circuit, at the government's urging, has broken ranks, this Court should grant review and definitively settle the question.

II. THE DECISION BELOW WILL FRUSTRATE TITLE VII'S DEFERRAL SCHEME.

The Petition explains that the ruling below also should be reviewed because it provides a powerful, albeit perverse,

incentive for Title VII claimants to abandon the administrative process to avoid the risk of under-compensation on fee matters. As we observed, the ruling below has no limiting principle, and would bar prevailing Title VII claimants from challenging administrative fee decisions in court even if fees were denied outright. Respondent makes two points that merit a brief response.

First, respondent disagrees with our forecast that the decision below will prompt an exodus from the EEOC, as well as its counterpart state and local agencies, and contends that "it is more reasonable to assume that plaintiffs will simply settle their fee dispute in the same forum where they settle their merits claim." Opp. Br. at 18. Other than unbridled optimism, however, respondent offers no reason why Title VII claimants would stay in an administrative forum and risk serious under-compensation or even non-compensation when they can go to court and be guaranteed market-rate based compensation. Indeed, respondent's argument was flatly rejected in *Carey*, where the Court stressed that "the existence of an incentive to get into federal court," such as the prospect of a full attorney fee award, "would ensure that almost all Title VII complainants would abandon" administrative proceedings as soon as possible. 447 U.S. at 66 n.6. Respondent advocates a rule that would expand and complicate federal litigation by requiring Title VII plaintiffs to include other claims with their relatively straightforward claims for fees, just to ensure jurisdiction. *See id.* (noting that "such a ground could almost always be found").

Second, respondent theorizes that permitting fees-only litigation under Title VII "would encourage needless litigation in federal courts." Opp. Br. at 18. Respondent speculates that, rather than settle for below-market-rates at the EEOC, claimant's lawyers would "use federal courts as routine arbiters of fee disputes." But that argument is an exercise in question-

begging. As this Court recognized in *West v. Gibson*, 527 U.S. 212, 218-220 (1999), Title VII litigants will inevitably migrate to federal court where they believe that the administrative process has limited remedial power or where, as here, will exercise it adversely to them. *See also Carey*, 447 U.S. at 66 & n.6. So long as administrative agencies like the EEOC persist in short-changing complainants, complainants will exercise the option that Congress gave them of leaving the administrative process and pursuing their remedies in federal court. Indeed, that was the central theme of this Court's rulings in *West* and *Carey*.

That was also the point of Congress' broad grant of authority for federal employees to bring suit. Section 2000e-16(c) authorizes federal employees to "file a civil action as provided by section 2000e-5(f)(3) of this title" whenever they are "aggrieved by the final disposition of the complaint." There is nothing in section 16(c), or anywhere else in Title VII, that deprives federal courts of jurisdiction over attorney's fees issues. Agency decisions are ordinarily subject to judicial review, *see, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and there is no evidence that Congress sought to deprive federal courts of the power to review EEOC decisions on any matter, including fees. *See, e.g., Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). Indeed, it is hard to imagine a more comprehensive authorization of suit than section 16(c). Despite all of this, respondent insists that EEOC fee decisions are immune from judicial review, even where the EEOC denied a fee to a prevailing complainant for no reason at all. That result cannot be squared with section 16(c), the normal rules governing judicial review of agency action, or the remedial purpose of Title VII. Yet that is the consequence of the Fourth Circuit's ruling.

As we emphasized in the Petition, the Fourth Circuit's ruling deals a body blow to the effective enforcement of Title VII, which depends both on the ability of claimants to obtain full relief before administrative tribunals like the EEOC and on the ready availability of a reasonable attorney's fee for a prevailing plaintiff. Because of its adverse impact on the enforcement of Title VII, this case merits review by this Court.

CONCLUSION

For the reasons stated above and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

David C. Vladeck
(Counsel of Record)
Tanya Y. Bartucz
Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner